

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MILPITAS UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014090329

ORDER FOLLOWING PREHEARING
CONFERENCE

On February 2, 2015, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Father appeared on behalf of Student. Laurie Reynolds, Attorney at Law, appeared on behalf of Milpitas Unified School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place at 1331 East Calaveras Boulevard, Milpitas, California, 95035, on February 10-12, 2015, and continue day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m., and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 9:30 a.m., unless otherwise ordered.¹

At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. Milpitas shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing. Milpitas shall ensure that the facility for the hearing fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to

¹ On January 30, 2015, Student filed a request to continue the hearing in this case to a later date, and Milpitas filed an opposition on February 2, 2015. Student withdrew the request during the PHC.

continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

a) Shall the two year statute of limitations governing special education cases be tolled to permit Student to bring claims against Milpitas that accrued prior to September 5, 2012?

b) Did Milpitas deny Student a free appropriate public education prior to her enrollment at the California School for the Deaf in Fremont, California in 2011?

Milpitas shall submit a written brief and supporting declarations to OAH, no later than 12:00 p.m., Friday, February 6, 2015, explaining why the two year statute of limitations should not be tolled in this matter. Student may submit a written brief in response to Milpitas prior to commencement of the due process hearing, but is not required to do so. However, Student shall be prepared to argue this issue at the commencement of the hearing. This argument may be supplemented by either sworn declarations or testimony. Following the parties' arguments, the ALJ may rule as to whether there has been a sufficient showing that Student can produce evidence that might support a tolling of the statute of limitations. Evidence may be taken as to the second issue only if Student has shown that there is a viable issue concerning the statute of limitations.

Student is asking for an unspecified type and amount of compensatory education services should she prevail at hearing.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing, with each exhibit separated from the next by a divider. It is suggested, but not ordered, that the parties use different colored binders for ease of use by witnesses when testifying. The parties shall use numbers to identify exhibits. At the hearing the ALJ shall place the letter "S" or "D" in front of an offered or admitted exhibit, or an exhibit referred to by a witness, to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be consecutively numbered or Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties must serve each other with the exhibit binders at least five business days before the commencement of the due process hearing unless they agree to a shorter time for the exchange. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used. The parties are asked, but not ordered, to provide curricula vitae or resumes for witnesses testifying in their professional capacity, such as teachers.

Inclusion of an exhibit in an exhibit binder, or presentation of an exhibit to the other side according to the agreed upon timeline, does not guarantee the admission of an exhibit. The ALJ shall determine whether the exhibit is relevant and admissible. Parties shall be prepared to make an “offer of proof” to the ALJ at hearing as to the admissibility of an exhibit.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. The parties have agreed that curricula vitae or resumes are not included as exhibits subject to this order.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. This means Milpitas is responsible for the attendance of its current employees, and they need not be subpoenaed by Student. In the event that a proposed witness is no longer employed by Milpitas, its attorney is urged, but not ordered, to provide contact information to Student so that the witness can be subpoenaed. Student can request subpoenas from OAH, and should do so as soon as possible.

The parties are ordered to meet and confer by 5:00 p.m., February 5, 2015, as to the schedule of witnesses. The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order or more than once. Neither party shall be permitted to call any witnesses not disclosed in the party’s prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties shall make every effort to schedule witnesses who require American Sign Language (ASL) interpretation on the same day or days. OAH will provide these interpreters. The parties shall notify OAH as soon as they have determined the scheduling of the witnesses who require an interpreter, but no later than noon on Friday, February 6, 2015.²

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has

² The parties did not know when these witnesses would testify at the time of the PHC. However, this information, once known, must be communicated to OAH as soon as possible, so that appropriate arrangements can be made for the attendance of qualified ASL interpreters.

discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. Scope of Witness Examination. If a witness is to be called by more than one party, the second party questioning the witness may expand cross-examination to include questions that might have been asked on direct examination had the party called the witness first. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from the parties containing all of each party's exhibits, prior to the hearing, and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

Milpitas's motion to allow [Redacted] to testify telephonically is granted, since this witness now resides in the state of Washington. Milpitas has agreed to provide [Redacted] with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing, and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Order of Presentation of Evidence. Since Student filed this case, her evidence shall be presented first, if at all possible.

8. Motions. No pretrial motions are pending or contemplated, other than the briefing previously discussed in this order. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of February 2, 2015.

9. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

10. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off during the hearing unless permission to the contrary is obtained from the ALJ.

11. Audio Recording of the Hearing. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. The ALJ has informed the parties that they may record the hearing. However, the parties are advised that OAH always makes a digital recording of the proceedings, and this recording is the official record of the hearing.

Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is “off the record.” Any violation of this order to turn off recorders when the matter goes off the record will result in the revocation of permission to record the hearing.

12. Compensatory Education and Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, frequency and need for any requested compensatory education.

13. Special Needs and Accommodations. An ASL interpreter may be required. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880, as soon as the need is known. Information concerning a request for reasonable accommodation is available on OAH’s website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

During the PHC Father indicated that Mother may require a special chair for the hearing due to her stature and a medical condition. He further indicated that he believed Milpitas had an appropriate chair since there was one available at the site of the hearing when the parties had Mediation in November 2014. If Milpitas cannot provide Mother with an appropriate chair for the hearing, Mother or Father should contact the OAH ADA Coordinator as soon as possible.

14. Hearing Closed To the Public. The hearing will be closed to the public.

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 12:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT **(916) 274-6035**. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE AT **916-376-6319**.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have

been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

16. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: February 2, 2015

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings